

U.S. Department of Labor

Office of Administrative Law Judges
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In the Matter of

ROMAN DANIELS
Claimant

v.

EASTERN ASSOCIATED COAL CO.
Employer

and

OLD REPUBLIC INSURANCE CO.
Carrier

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party-in-Interest

DATE ISSUED: OCTOBER 20, 2000

CASE NO. 2000-BLA-145

Appearances:

S.F. Raymond Smith, Esq.
For the Claimant

Paul E. Frampton, Esq.
For the Employer

Before: ROBERT J. LESNICK
Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et. seq. In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A hearing was conducted in Beckley, West Virginia on June 7, 2000 at which time all parties were afforded a full opportunity to present evidence and argument, as provided in the Act and the Regulations issued thereunder, found in Title 20, Code of Federal Regulations. During the hearing Director's Exhibits Nos. 1 through 28, Claimant's Exhibits Nos. 1 through 4, and Employer's Exhibits Nos. 1 through 9 were received in evidence.¹ No additional evidence was submitted post-hearing. All of this evidence has been made part of the record.

ISSUES

- 1.) Whether the Claimant has pneumoconiosis.
- 2.) Whether the Claimant's pneumoconiosis arose out of coal mine employment.
- 3.) Whether Claimant is totally disabled.
- 4.) Whether Claimant's total disability is due to pneumoconiosis.
- 5.) Whether there has been a material change of condition.
- 6.) Whether Michael Ray, son of the Claimant is a dependent.

¹ The following abbreviations have been used in this opinion: DX = Director's exhibits; EX = Employer's exhibits; CX = Claimant's exhibits; ALJX = Court exhibits; TR = Hearing Transcript; NR = Not recorded; BCR = Board-certified radiologist; B = B reader.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History and Factual Background

Roman Daniels (“Claimant” or “miner”) filed his first claim for benefits on December 20, 1994. (DX 26-1) By Notice dated May 23, 1995 a Claims Examiner for the Office of Workers’ Compensation Programs denied benefits to Claimant. (DX 26-17) On March 14, 1985 the Claimant was granted a 25% award from the West Virginia Workers Compensation Fund. (DX 5) That award was later increased by 1% on February 6, 1991 and was increased again on January 25, 1994 by 15%. (DX 5) The Claimant filed the current claim for benefits on March 30, 1999. (DX 1) By Notice dated August 13, 1999, a Claims Examiner from the Office of Workers’ Compensation Programs notified the Claimant that he was not entitled to benefits because the Claimant failed to show that he suffers from pneumoconiosis, that such disease was caused at least in part by coal mine worked and also that he is totally disabled. (DX 18) The claim was referred to the Office of Administrative Law Judges for hearing. (DX 27)

Claimant testified at the March 30, 2000 hearing that he last worked in the coal mines in 1993 and at that time held the position of shuttle car operator. The Claimant testified that his job activities included hauling coal from the face to the belt line and loading supplies, including containers of rock dust that weighed approximately 50 pounds. (TR 16-17) The Claimant testified that prior to his position as a shuttle car operator, he worked as a belt man for 6 to 8 years. (TR 18) That position entailed cleaning around the belts and shoveling coal and rock dust. (TR 18) The Claimant also held the position of motor operator. (TR 20)

The Claimant went on to state that he experienced problems with his breathing while he was working in the coal mining industry. (TR 21) The Claimant testified that he becomes short of breath when engaging in strenuous exercise as well as being short of breath while at rest. (TR 21-22) In addition, he also testified that he has smoked cigarettes since he was 19 years old. (TR 22 - 23) Claimant stated at the hearing that he has taken pills and has used a spray for the last 7 to 8 years. (TR 22) He receives West Virginia State Benefits for occupational benefits and silicosis, as well as a United Mine Workers of America pension benefits and social security. (TR 23 & 25)

Duplicate Claim

The present claim filed March 30, 1999, was filed more than one year after Claimant’s previous claim was denied. Pursuant to 20 C.F.R. § 725.309, this claim must be denied as a duplicate claim unless Claimant can show that there has been a material change in conditions since the prior denial. If Claimant is successful in showing such a change, then his claim must be evaluated under Part 718, *as amended*. See *Dotson v. Director, OWCP*, 14 B.L.R. 1-10 (1990) (en banc). This claim is governed by the law of the United States Court of Appeal for the 3rd Circuit of Appeals for establishing a change in condition.

Medical Evidence

<i>Exhibit No.</i>	<i>Date of X-ray</i>	<i>Date of Reading</i>	<i>Physician/ Qualifications</i>	<i>Interpretation</i>
EX 3	11-24-92	2-4-00	Wheeler, BCR/B	Negative
EX 3	11-24-92	2-3-00	Scott, BCR/B	Negative
EX 3	11-24-92	2-3-00	Gayler, BCR/B	Negative
EX 3	2-1-94	2-4-00	Wheeler, BCR/B	Negative
EX 3	2-1-94	2-3-00	Scott, BCR/B	Negative
EX 3	2-1-94	2-3-00	Gayler, BCR/B	Negative
DX 26	2-27-95	NR	Cole, BCR/B	Negative
DX 26	2-27-95	2-28-95	Patel, BCR/B	1/1
EX 3	3-20-97	2-4-00	Wheeler, BCR/B	Negative
EX 3	3-20-97	2-3-00	Scott, BCR/B	Negative
EX 3	3-20-97	NR	Gayler, BCR/B	Negative ²
DX 14	6-4-99	7-27-99	NR	0/1
DX 15	6-4-99	7-4-99	Navani, BCR/B	Negative
DX 16	6-4-99	6-9-99	Patel, BCR/B	1/0
EX 2	6-4-99	12-30-99	Wheeler, BCR/B	Negative
EX 2	6-4-99	12-29-99	Scott, BCR/B	Negative
EX 2	6-4-99	12-29-99	Gayler, BCR/B	Negative
EX 1	10-27-99	11-28-99	Zaldivar, B	Negative
EX 3	10-27-99	2-4-00	Wheeler, BCR/B	Negative
EX 3	10-27-99	2-3-00	Scott, BCR/B	Negative

² “When an x-ray is not classified, and makes no mention of pneumoconiosis, the administrative law judge has discretion to infer whether or not the x-ray is negative for pneumoconiosis.” *Billings v. Harlan #4 Coal Co.*, BRB No. 94-3721 BLA (June 19, 1997) (*unpublished*). Dr. Gayler notes that there are “5 mm density lot to R fiber (illegible).” I find that since Dr. Gayler’s report makes no mention of pneumoconiosis, that the reading is negative.

EX 3	10-27-99	2-3-00	Gayler, BCR/B	Negative
CX 1	12-3-99	12-14-99	Pathak, B	1/1
CX 2	12-3-99	12-8-99	Aycoth, B	1/0
CX 3	12-3-99	12-10-99	Ahmed, BCR/B	1/1
EX 8	12-3-99	5-25-00	Wheeler, BCR/B	Negative
EX 8	12-3-99	5-25-00	Scott, BCR/B	Negative
EX 8	12-3-99	5-26-00	Gayler, BCR/B	Negative

Pulmonary Function Studies

<i>Ex. No.</i>	<i>Date</i>	<i>Age</i>	<i>Height</i>	<i>FEV1</i>	<i>MVV</i>	<i>FVC</i>	<i>Tracings</i>	<i>Qualify</i>
DX 26	2-27-95	50	69	2.41 2.54*	117 117*	4.10 4.41*	Yes	No
DX 9	6-4-99	54	69	1.98 2.13* ³	90 100*	4.12 4.37*	Yes	Yes
EX 1	10-27-99	55	69	1.77 2.02**	86 88**	3.87 4.33**	Yes	Yes

For a miner of Claimant's height of 69.5⁴ inches, § 718.204 (c)(1) requires an FEV1 equal to or less than 2.19 for a male of 50 years of age, 2.13 for a male of 54 years, and 2.11 for a male of 55 years. If such and FEV1 value is shown, there must be in addition, an FVC equal to or less than 2.76, 2.69 and 2.67 respectively or an MVV equal to or less than 88, 85 and 84; or a ratio equal to or less than 55% when the results of the FEV1 tests are divided by the results of the FVC

³ The * indicates that the results are post-bronchodilator.

⁴ The fact finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in this claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). This is particularly true when the discrepancies may affect whether or not the tests are "qualifying." *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 3 (4th Cir. 1995). In this case, Mr. Fleming's listed height ranges from 69 to 70 inches. Taking the average of the heights listed, I find that Claimant is 69.5 inches tall.

test. Qualifying values for other ages and heights are as depicted in the table above. The FEV1/FVC ratio requirement remains constant.

Arterial Blood Gas Tests

<i>Exhibit No.</i>	<i>Date</i>	<i>pO2</i>	<i>pCO2</i>	<i>Qualify</i>
DX 26	2-27-95	78 106** ⁵	35 28**	No
DX 13	6-4-99	81 79**	34 37**	No
EX 1	10-27-99	97 88**	34 37**	No

Physician Reports

Dr. Rasmussen

Dr. D.L. Rasmussen⁶ saw the Claimant first on November 24, 1992, and issued his report on December 30, 1992, in connection with the Claimant's state claim for state workers' compensation claim. (EX 9) At that time, Dr. Rasmussen concluded that the Claimant suffered from occupational pneumoconiosis. In making such diagnosis, Dr. Rasmussen relied on the Claimant's description of his symptoms as well as a chest x-ray, interpreted by Dr. Speiden. Dr. Rasmussen again saw the Claimant on February 27, 1995, in conjunction with the Claimant's first claim for benefits under the Act. (DX 26-12) At that time, Dr. Rasmussen concluded that the Claimant suffered from pneumoconiosis due to coal dust exposure and chronic airflow obstruction caused by a history of cigarette smoking and coal dust exposure.

Dr. Rasmussen saw the Claimant again on June 4, 1999. (DX 12) Dr. Rasmussen noted that Claimant's chief complaints were sputum production, wheezing on exertion and with certain external stimuli, dyspnea for the 10 years prior to the examination date, chest pain, orthopnea, ankle edema and occasional paroxysmal nocturnal dyspnea. Dr. Rasmussen noted that Claimant was currently smoking cigarettes at a rate of 1/2 pack per day. It was also noted that the Claimant has smoked cigarettes since 1962. Dr. Rasmussen noted that Claimant's last job in the coal mining industry was as a belt man and a shuttle car operator. The Claimant stated that in this position, he was required to engage in heavy manual labor.

⁵ The ** indicates that the results are after exercise.

⁶ Dr. Rasmussen is board certified in internal medicine and board eligible for certification in pulmonary diseases.

A pulmonary function study dated June 4, 1999 was interpreted as showing moderate, irreversible obstructive impairment. A chest x-ray was also considered by Dr. Rasmussen that indicated that the Claimant suffers from pneumoconiosis. Dr. Rasmussen noted that the Claimant's arterial blood gas study produced normal results.

Dr. Rasmussen reached the conclusion that Claimant suffers from pneumoconiosis as well as chronic obstructive pulmonary disease. Dr. Rasmussen bases his conclusion on Claimant's abnormal chest x-ray, which he finds to be compatible with the existence of pneumoconiosis and the Claimant's history of coal mine employment which is sufficient to produce significant dust exposure. Dr. Rasmussen states that based on the presence of pneumoconiosis, there is moderate loss of the lung function. Dr. Rasmussen noted that there are two and possibly three risk factors that contribute to the Claimant's impairment: the Claimant's history of cigarette smoking, possible hyperactive airway disease and the Claimant's exposure to coal mine dust. The last factor being considered a "significant contributing factor." Lastly, Dr. Rasmussen concludes in his report that Claimant is incapable of performing the duties of his last coal mine employment.

Dr. Rasmussen issued another report on March 21, 2000 regarding the Claimant. (CX 4) Dr. Rasmussen reviewed various documents from the Claimant's medical history and reached the conclusion that the Claimant suffers from "chronic obstructive lung disease sufficient to render him totally disabled for resuming his last regular coal mine job."⁷ Dr. Rasmussen notes that the Claimant's impairment is primarily a moderate "obstructive airway insufficiency." Dr. Rasmussen also states that the Claimant's condition reaches the point of rendering the Claimant incapable of performing the requirements of his last coal mine employment. Again, Dr. Rasmussen indicates that there are the same three possible risk factors for the Claimant's condition.

Dr. Rasmussen also takes issue with Dr. Zaldivar's conclusion, dated October 27, 1999. Dr. Rasmussen disagrees with Dr. Zaldivar's conclusion that the Claimant's condition is reversible. Dr. Rasmussen also takes issue with the use of x-ray evidence in diagnosing occupational pneumoconiosis. Dr. Rasmussen characterizes the x-ray as an "imperfect tool" for diagnosing pneumoconiosis and advances the proposition that "significant" pneumoconiosis may well be present, even in the absence of x-ray changes. Dr. Rasmussen concludes that the Claimant suffers from a "chronic dust disease of the lung which arose as a consequence of his employment in the coal mine industry."

Dr. Rasmussen was also deposed in connection with this claim on June 1, 2000. (EX 6) Dr. Rasmussen stated little in the deposition that was additional to his written report. Dr. Rasmussen did acknowledge that if the Claimant were to stop smoking cigarettes that his diffusing capacity would be improved. Dr. Rasmussen also reiterated that while he cannot rule

⁷ In reaching his diagnosis, Dr. Rasmussen reviewed DX 1, 4-5, 9-17, and 26; reports of Drs. Wheeler, Scott and Gayler of chest x-rays taken on 11-24-92, 2-1-94, 3-20-97, 6-4-99 and 10-27-99; Dr. Zaldivar's report of 11-3-99; Dr. Pathak's report; Dr. Aycoth's report; Dr. Ahmed's report and spirometry diffusing capacity dated 1-5-99.

out smoking as the cause of the Claimant's condition, he also cannot rule out coal dust exposure as the cause. Dr. Rasmussen stated that the Claimant's condition is not completely perfected with the use of bronchodilators and therefore, a diagnosis of asthma is not indicated.

Dr. Kayi

Dr. Mallinath Kayi⁸ issued a medical report in the Claimant's former action, dated July 8, 1986. (DX 26-9) Dr. Kayi noted that the Claimant's chief complaints included shortness of breath and a cough producing black sputum for the four years prior to the date of the examination. The Claimant's other symptoms included vague chest pain and wheezing during the times that he feels short of breath. Dr. Kayi stated that Claimant had 15 years of coal mine employment at the time of the examination.

Dr. Kayi noted a smoking history of 1/2 to 1 pack per day for the 10 years prior to the date of the examination. Dr. Kayi also notes that the Claimant stated that he had quit smoking one year before the examination. Dr. Kayi indicated that the Claimant lungs showed normal "antero-posterior diameter with normal air entry." A chest x-ray was also taken at the time and interpreted by Dr. Nichols. The x-ray was interpreted to show "no active process identified." A pulmonary function study was also performed at that time of the examination, showing moderate obstructive lung disease that responds well to a bronchodilator, as well as mild restrictive lung disease and a normal diffusing capacity. Dr. Kayi concluded that the Claimant suffers from a chronic airflow limitation and restrictive lung disease. Dr. Kayi concluded that bronchodilator therapy was indicated for the Claimant. Lastly, Dr. Kayi states that the "disability resulted to the lungs from [the Claimant's] occupation is partial, but permanent in nature."

Dr. Zaldivar

Dr. George Zaldivar examined the Claimant on October 27, 1999. (EX 1) Dr. Zaldivar is board certified in internal medicine and pulmonary disease, as well as being a B Reader. In assessing Claimant's condition, Dr. Zaldivar reviewed numerous documents dealing with the Claimant's condition that essentially constitute the record in this claim. Dr. Zaldivar notes 23 years of coal mine employment underground. Dr. Zaldivar notes all of the Claimant's previous coal mine jobs and the level of manual labor associated with each. Dr. Zaldivar also notes the medications presently being taken by the Claimant. Dr. Zaldivar also notes that the Claimant has a significant smoking history including smoking anywhere from 1/2 to 3 packs of cigarettes per day since the age of 19.

Claimant's chief complaint at the time of his examination was that he was experiencing shortness of breath when walking on a level surface and up stairs and when exposed to fumes. Claimant also stated that he was experiencing a cough and wheezing. The Claimant complained of

⁸ Dr. Kayi's letterhead indicates that he practices in the areas of pulmonary diseases, critical care medicine and internal medicine.

orthopnea, ankle swelling and chest pain. Dr. Zaldivar concluded that the Claimant suffers from asthma that is not related to the Claimant's coal mine employment. Dr. Zaldivar goes on to opine that the Claimant suffers from bronchitis resulting from the asthma as well as the Claimant's smoking history. Dr. Zaldivar states that the Claimant does not suffer from coal workers' pneumoconiosis nor does he suffer from any dust disease of the lungs. Dr. Zaldivar stated that "intensive bronchodilator therapy" is indicated for treatment of the Claimant's asthma. Dr. Zaldivar also states that the Claimant's condition would improve if the Claimant were to cease smoking cigarettes. If such therapy and lifestyles change were instituted, the Claimant would be capable of performing his last coal mine job.

Dr. Zaldivar was also deposed in connection with this claim on May 30, 2000. (EX 5) Dr. Zaldivar reiterated that he believes the Claimant's condition to indicate asthma because of the reversibility with the use of a bronchodilator. Dr. Zaldivar did state that coal dust can cause an acute attack of asthma, but that no lasting problems occur. Dr. Zaldivar ruled out coal worker's pneumoconiosis because the Claimant's condition was responsive to the use of a bronchodilator, there was no lung reaction that indicated the "dust burden to be high enough to be causing problems." The Claimant's blood gases were also well preserved during exercise. Dr. Zaldivar states "[N]one of [the Claimant's] respiratory symptoms, bronchitis or anything else pertaining to respiratory symptoms are related to [the Claimant's] occupation."

Dr. Fino

Dr. Fino, who is board certified in internal medicine and pulmonary diseases and is a B Reader, issued a report detailing his findings on May 2, 2000. (EX 3) Dr. Fino notes an occupational history of 23 years of coal mine employment. In making his diagnosis, Dr. Fino did not examine the Claimant, however, he reviewed numerous documents, that essentially constitute the entire medical record in this claim. Dr. Fino states unequivocally that the Claimant does not suffer from any "occupationally acquired pulmonary condition as a result of coal dust exposure." Dr. Fino does state that the Claimant's pulmonary system is abnormal and the Claimant cannot perform his last coal mine job. Dr. Fino opines that the Claimant's condition is consistent with a smoking related disability. Dr. Fino concludes that there is insufficient objective medical information to justify a diagnosis of coal workers' pneumoconiosis. Dr. Fino goes on the state that the Claimant does not suffer from any occupationally induced pulmonary condition and that the Claimant's disability was caused by the Claimant's history of cigarette smoking.

Dr. Fino was also deposed in connection with this action on July 5, 2000. (EX 7) Dr. Fino states that the Claimant suffers from a significant, disabling respiratory impairment and that such impairment prevents the Claimant from returning to his last job or a job with similar exertion. However, Dr. Fino states that the Claimant's condition is reversible, which is indicated by the results of the bronchodilator treatments. Dr. Fino opines that this indicates that the Claimant suffers from an obstruction caused by an extensive history of smoking. Reversibility of the condition is not consistent with a finding of coal workers' pneumoconiosis. Dr. Fino also states that coal workers' pneumoconiosis is counter indicated by the fact that the Claimant's abnormality

occurs in the small airways, coal workers' pneumoconiosis appearing in the large airways. Dr. Fino also draws attention to the fact that the Claimant's arterial blood gas study did not drop below normal with exercise, which would be expected in an disabling coal mine dust related pulmonary condition.

Conclusions of Law

Length of Coal Mine Employment

The parties have agreed to and I find that Claimant was a coal miner within the meaning of the Act for 21.25 years. (TR 6)

Responsible Operator

The parties agreed to and I find that Eastern Associated Coal Company is the responsible operator and will provide for the payment of any benefits awarded to the Claimant. (TR 6)

Dependents

The parties agreed at the hearing that dependency is an issue in this claim, however, neither party has addressed the issue further. (TR 6) A claimant's award of benefits should be augmented on behalf of the following dependents who meet the conditions of relationship set out in the regulations: (1) spouse; (2) divorced spouse; or (3) child. 20 C.F.R. §§ 725.210. I find that the Claimant's wife, Karen Boggs is a qualifying dependent for purposes of augmentation of benefits under the Act.

I find that Michael Ray meets the relationship requirements of 20 C.F.R. § 725.208 because Michael Ray is the Claimant's natural born son as evidenced by the Claimant's name appearing on the child's birth certificate. (DX 1) This evidence has not been controverted by the respondent.

For the individual claiming to be the miner's dependent child to qualify for that status under the dependency test set forth in 20 C.F.R. § 725.209, that individual must be unmarried and either under the age of 18, disabled, or a qualifying student. I find that Michael Ray also meets the dependency requirement. The Claimant testified at the hearing that although Michael Ray has reached the age of 18, he is a student at "West Virginia Tech." (TR 27) The Employer has presented no evidence to the contrary, and thus the Claimant's testimony will be taken as true. Therefore, I find that Michael Ray qualifies as a dependent for the purposes of augmentation under the Act.

Change in Conditions and Existence of Pneumoconiosis

As this is Claimant's second claim for benefits, he must establish that there has been a

material change in conditions since the denial of his last claim. § 725.309(d). The administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated a material change in condition and all of the record evidence must then be evaluated to determine if he is entitled to benefits under the Act. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995); *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996) (en banc); *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994).

The previous claim was denied because Claimant was unable to prove that he suffers from pneumoconiosis, that such disability arose out of coal mine employment and that such condition was totally disabling. Therefore, in order for the Claimant to prove a change in conditions, the new evidence must be evaluated to determine whether any of these elements can now be established.

The regulations provide four methods for finding the existence of pneumoconiosis: chest x-rays, autopsy or biopsy evidence, the presumptions in §§718.304, 718.305 and 728.306, and medical opinions. §718.202(a)(1)-(4). There is no evidence of complicated pneumoconiosis, and Claimant is a living miner who filed his claim after January 1, 1982, he is not eligible for the presumptions in §§ 718.304, 718.305, 718.306.

The first method provided in the regulations is by chest x-ray evidence. 20 C.F.R. § 718.202(a)(1). There are nineteen interpretations of four different x-ray films contained in the record as part of Claimant's current claim for benefits. Four of the nineteen readings are positive for pneumoconiosis. Of the four readings, two were rendered by board certified radiologists and B Readers, while the other two were rendered by B Readers. The remaining fifteen interpretations are negative for the existence of pneumoconiosis. All but two of these interpretations were rendered by dually-qualified physicians, one was rendered by a B Reader and the last physician's qualifications are unknown.

A judge is not required to defer to the numerical superiority of x-ray evidence. *Wilt v. Wolverine Mining Co.*, 14 B.L.R. 1-70 (1990). Where two or more x-ray reports are in conflict, the radiological qualifications of the physicians interpreting the x-rays must be considered. (See 20 C.F.R. § 718.202 (a)(1)). Great weight may be given to B-Readers due to their expertise. *Aimone v. Morrison Knudson Co.*, 8 B.L.R. 1-689 (1985). The interpretations of dually qualified physicians are entitled to more weight than the interpretations of B-Readers. *Herald v. Director, OWCP*, B.R.B. No. 94-2354 BLA (Mar. 23, 1995) (unpublished). Moreover, it is improper to accord greater weight to the interpretations of a physician whose qualifications are unknown. *Stanley v. Director, OWCP*, 7 B.L.R. 1-386 (1984).

I accord the most weight to the interpretations of dually qualified physicians contained in the record. I also accord great weight to the interpretations of the B-Readers. Less weight is accorded to the physicians whose qualifications are not of record. I find that the Claimant has

failed to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence.

The Claimant has failed to establish the existence of pneumoconiosis by the second and third methods because there is no biopsy evidence and he is a living miner who filed a claim after 1982 without evidence of complicated pneumoconiosis. 20 C.F.R. §§ 718.202(a)(2) and (a)(3).

The fourth method available to the Claimant to establish the existence of pneumoconiosis is by a reasoned medical opinion from a physician establishing that the Claimant suffers from a respiratory or pulmonary impairment arising out of coal mine employment or by meet the definition of pneumoconiosis provided at 20 C.F.R. § 718.201. 20 C.F.R. § 718.202(a)(4). Section 718.201 defines pneumoconiosis as a “chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment...[a] disease ‘arising out of coal mine employment’ includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.”

Four physician opinions appear as part of the record for the Claimant’s current claim for benefits. Dr. Rasmussen opined that the Claimant suffers from a chronic dust disease of the lung which arose as a consequence of the Claimant’s employment. Dr. Rasmussen bases his opinion on the Claimant’s medical data as well as the current medical literature available on the subject. However, both Dr. Fino and Dr. Zaldivar agree that the Claimant does not suffer from an occupationally induced pulmonary condition. Dr. Zaldivar attributes the Claimant’s condition to asthma as well as resultant bronchitis. Dr. Zaldivar opined that the Claimant’s condition could be corrected with the use of bronchodilation therapy and the cessation of cigarette smoking. Dr. Zaldivar bases his opinion on the medical data contained in the record as well as his examination of the Claimant and the currently available medical literature. Dr. Fino found that the Claimant suffers from disabling, respiratory impairment induced by the Claimant’s history of cigarette smoking. Dr. Fino bases his opinion on a review of the medical data available in the record as well as the current medical literature available on the subject.

I accord greater weight to the opinions of Drs. Zaldivar and Fino. A non-examining physician’s opinion may constitute substantial evidence if it is corroborated by the opinion of an examining physician or by the evidence considered as a whole. *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984); *Easthom v. Consolidation Coal Co.*, 7 B.L.R. 1-582 (1984). Dr. Rasmussen, while the Claimant’s treating physician, has failed to explain the reversibility of the Claimant’s condition that is found with the bronchodilation treatments. Therefore, I find that the opinions of Dr. Zaldivar and Fino to be better supported by the objective medical data, and to be well-reasoned and well-documented considering the evidence contained in the record and therefore entitled to greater weight. Accordingly, I find that the Claimant has not established the existence of pneumoconiosis arising out of coal mine employment. It is now necessary to determine if the Claimant is totally disabled due to pneumoconiosis.

Total disability is defined as pneumoconiosis which prevents or prevented a miner from

performing his usual coal mine employment or other gainful work. §§ 718.305(c), 718.204(b). Section 718.204 sets out the standards for determining total disability. This section provides that in the absence of contrary probative evidence, evidence which meets the standards at § 718.204(c)(1)-(5) shall establish the miner's total disability.

Total disability may be established by pulmonary function testing. 20 C.F.R. § 718.204(c)(1). There are two pulmonary function studies in the record for the current claim. Both of the studies produce qualifying values to show disability under the regulations. Therefore, I find that the Claimant has established by a preponderance of the pulmonary function tests evidence that he is totally disabled under the provisions of (c)(1).

The Claimant can also establish total disability with qualifying arterial blood gas testing that meets the regulation standards. 20 C.F.R. § 718.204(c)(2). There are two arterial blood gas studies in the record for the current claim. Neither of the studies meet the qualifying values. Accordingly, I find that the Claimant has failed to establish total disability pursuant to 20 C.F.R. § 718.204 (c)(2).

There is no evidence that the Claimant suffers from cor pulmonale with right-sided congestive heart failure. Therefore total disability is not established under 20 C.F.R. § 718.204(c)(3). Total disability may also be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concluded that the Claimant respiratory or pulmonary impairment prevents him from engaging in his usual coal mine work or in comparable and gainful employment. All three of the physicians of record in the current claim agree that the Claimant, in his present condition, is totally disabled from engaging in his usual coal mine work. While they disagree over whether such condition is reversible, at present, all agree that the Claimant is presently unable to perform his usual coal mine work.⁹ Therefore, I find that the Claimant has established that he is totally disabled and therefore has established a material change in condition since the prior denial of his claim.

Considering that the Claimant has established a material change in condition, it is appropriate to review all of the evidence of record to determine if the Claimant is entitled to benefits under the Act. I have reviewed all of the evidence contained in the record, and I find that the Claimant has failed to establish by a preponderance of the evidence that he suffers from pneumoconiosis. The regulations at 20 C.F.R. § 718.202 provide the methodology available to establish the existence of pneumoconiosis.

There are eight interpretations that were not considered above. Of those eight

⁹ Dr. Zaldivar states that the Claimant would be able to return to his usual employment if the Claimant were to stop smoking cigarettes and be treated with bronchodilator therapy. At present, neither of those things are occurring, and therefore, Dr. Zaldivar's opinion will be interpreted as meaning that if those two things do not occur, that the Claimant is unable to return to his usual employment.

interpretations, only one was positive for pneumoconiosis. I have accorded greater weight to the more recent x-ray evidence discussed above. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc); *Stanford v. Director, OWCP*, 7 B.L.R. 1-541 (1984); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-6 (1983). I find that the Claimant has failed to establish by a preponderance of the x-ray evidence that he suffers from pneumoconiosis.

There are also two physician opinions that were contained in the Claimant's first claim for benefits under the Act. Dr. Rasmussen issued a report in 1992 and 1995, both finding that the Claimant suffers from coal workers' pneumoconiosis. I accord less weight to the opinion of Dr. Rasmussen because the reports issued at those times were not supported by the objective medical data available at the time of the reports. There is also a report from Dr. Kayi. Dr. Kayi's credentials are not contained in the record, and therefore, his opinion is entitled to little to no weight.

I find that looking at the record as a whole, Drs. Zaldivar and Fino are entitled to greater weight because their opinions are better supported by the objective medical data. While it is error to discredit an opinion solely on the grounds that it is based, in part, upon an x-ray reading which is at odds with the administrative law judge's findings, it is proper to credit physicians' opinions that are supported by the underlying objective studies. *Church v. Eastern Associated Coal Co.*, 21 B.L.R. 1-51 (1997), *rev'g in part and aff'g in part on recon.*, 20 B.L.R. 1-8 (1996). The reports of Drs. Fino and Zaldivar are well-reasoned and well-documented and therefore entitled to greater weight. Accordingly, I find that the Claimant has failed to establish by a preponderance of the medical opinion evidence that he suffers from pneumoconiosis. Accordingly, the Claimant has failed to establish that he suffers from pneumoconiosis by any of the methods provided for in the regulations. While the Claimant is totally disabled, such condition is not due to pneumoconiosis arising out of his coal mine employment. Therefore, the Claimant is not entitled to benefits under the Act.

Entitlement

Upon consideration of all of the evidence of record, I find that Claimant has not met his burden of proof on all elements of entitlement under the Act and is therefore eligible for benefits.

Attorney's Fees

The award of an attorney's fee under the Act is permitted only in cases in which the Claimant is found to be entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services rendered to him in pursuit of this claim.

ORDER

The claim of Roman Daniels for benefits under the Act is hereby DENIED.

ROBERT J. LESNICK
Administrative Law Judge

RJL/JBM

NOTICE OF APPEAL RIGHT: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this Decision and Order by filing notice of appeal with the ***Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601.*** A copy of notice of appeal must also be served on *Donald S. Shire, Esq., Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.*